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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

IN RE: RICHARD LOWELL ROSENQUIST,

Petitioner.

On Petition For Writ Of Mandamus
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF MANDAMUS

RICHARD LOWELL ROSENQUIST
25045 Beaumont Avenue
Linden, Iowa 50146
(641) 757-9295
Pro Se

QUESTIONS PRESENTED FOR REVIEW

1.) Whether the Prosecutor and the District Court erred in Appellant's due process by not presenting an essential legal element being the official tax assessment record (Form 4340) to the grand jury and petit jury to establish an income tax liability.

2.) Whether the Prosecutor and the District Court erred by the prosecutor not proving each and every essential element of an offense per grand jury and petit jury instructions, since the issue of a tax "liability assessment" was not mentioned or proven, the prosecution failed to prove each and every essential element.

PARTIES TO THE PROCEEDING

The Parties to the proceeding are:

RICHARD L. ROSENQUIST, an individual, on behalf of himself;

THE UNITED STATES OF AMERICA.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Petitioner filed a Brief June 29, 2010 (# 10-1307) in the Eighth Circuit Court of Appeals, which was denied November 4, 2010.

Petitioner filed an En Banc Hearing November 17, 2010 (# 10-1307) in the Eighth Circuit Court of Appeals, which was denied December 13, 2010.

JURISDICTION

This Honorable Court has jurisdiction to issue extraordinary writs under 28 U.S.C. § 1651(a) and U.S. Supreme Court Rule 20 (especially) "except in certain narrowly defined circumstances" where extreme violations have occurred. Adequate relief cannot presently be obtained in any other form, or from any other court.

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Fifth Amendment of the Constitution of the United States of America:

> . . . nor be deprived of . . . liberty . . . without due process of law . . .

STATEMENT OF THE FACTS

The Petitioner was indicted by a Federal Grand Jury on six (6) counts of violating the Internal Revenue Code. Several Motions to Dismiss were filed in this case alleging fatal errors on the part of the prosecutor which were denied. Petitioner was sentenced to fifty-one (51) months in federal prison and is now pursuing this appeal to the Honorable Eighth Circuit Court.

There Is No Criminal Offense Without A Proper Income Tax Assessment Record.

STATEMENT OF THE ISSUES

1.) Whether the Honorable Appellate Panel erred when it refused to dismiss Petitioner's Grand Jury Indictment.

2.) Whether the Honorable Appellate Panel erred when it refused to dismiss the Grand Jury indictment which has missing essential legal and fact elements and has overcharging. There was no official tax assessment record (Form 4340) presented to the grand jury. The statute of limitations has caused Counts 1 thru 6 to become void.

3.) Whether Petitioner's rights under the Fifth Amendment due process of law and equal protection of the law have been violated and whether relief needs to be granted.

STATEMENT OF RELIEF SOUGHT BY PETITIONER

By this Petition for Writ of Mandamus, Petitioner seeks an order from this Honorable Court directing the Honorable Supreme Court to do nothing more than to Order the Appellate Court to perform its duty under the Constitution, reversing the said order of the Appellate Court and taking judicial notice that the Assessment records of the Petitioner were not given to the Grand Jury in violation of the law.

REASONS WHY THE WRIT SHOULD ISSUE

1.) & 2.) No tax assessment record was presented to the Grand Jury.

The Sixth Amendment of the U.S. Constitution requires that all elements of the crime be found by the petit jury. *U.S. v. Caldwell*, 989 F.2d 1056, 1061 (9th Cir. 1993); *U.S. v. Harrison-Philpot*, 978 F.2d 1520, 1526 (9th Cir. 1992); *see also U.S. v. Gaudin*, 986 F.2d 1267, 1272 (9th Cir. 1993); *Carella v. California*, 491 U.S. 263, 268-69, 109 S.Ct. 2419, 2422, 105 L.Ed.2d 218 (1989) (Scalia, J., concurring); *Bollenbach v. U.S.*, 326 U.S. 607, 614, 66 S.Ct. 402, 406, 90 L.Ed. 350 (1946).

There is No Criminal Offense Without a Proper Income Tax Assessment Record.

The "government" did not follow its own procedures involving the IRS tax liability assessment of the Defendant. (a) The government misled/confused the Grand Jury by naming persons, other than Defendant within the *Rosenquist* Indictment to confuse/trick the Grand Jury into thinking that Defendant was responsible for taxes due from these other persons. (b) The government had not legally and properly assessed an income tax on Defendant named in the indictment. To have a legal income tax assessment, a certified individual or company tax assessment record must be prepared by the "government" on or with a Form 4340, including a Form 2866 – Certificate of Official Record. This was not done.

The legal basis background for the requirement of a Form 4340 and a Form 2866 is as follows:

Section 6201 of the Internal Revenue Code provides the authority for assessment. Until an assessment of tax has been made, the IRS is not entitled to collect a tax administratively. The lien provisions of the Code depend upon the making of a demand for payment, and there cannot be a demand for payment if there is no assessment. *See* I.R.C. §§ 6303(a) and 6321. The Internal Revenue Service is precluded from administratively collecting a *presumed* tax liability without a valid assessment.

Generally speaking, an assessment is the formal recording of a taxpayer's alleged tax liability. Section

6203 provides that the "*assessment shall be made by recording the liability of the taxpayer in the Office of the Secretary in accordance with rules or regulations prescribed by the Secretary.*" The regulations on Procedure and Administration further provide as follows:

> "*. . . the assessment shall be made by an officer signing the summary record of assessment. The summary record, through supporting records, shall provide the identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. . . . The date of the assessment is the date the summary record is signed by an assessment officer.*" Treas. Reg. 301.6203-1.

Thus, to make a valid assessment, the IRS must record the assessment on a signed summary record of assessment and create a supporting record that includes the four elements referred to in the regulation.

Title 26 U.S.C. § 6203 simply provides that:

> "*. . . the assessment shall be made by recording the liability of the taxpayer in the Office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment. The regulations accompanying this statute provide that [the assessment shall be made by an assessment officer signing the summary record of assessment]*"

> 26 C.F.R. § 301.6203-1 (2002). "*The regulations provide the summary record of assessment shall include certain information and that upon a taxpayer's request, 'he shall be furnished a copy of the pertinent parts of the assessment which set forth [certain information].*" Id.

The IRS has historically used Form 23C as the "Summary Record of Assessments" or "Assessment Certificate," as explained in the Internal Revenue Service Manual. Whether this assessment is made on a Form 23C or on a Form 4340, or any other "form," the assessment still has to be made; and regardless of the form used, the IRS must comply with the regulations governing the assessment process. The purpose of these regulations is to ensure both the efficiency and the accuracy of the assessment process.

The signature requirement in 26 C.F.R. § 301.6203-1 appears to serve multiple purposes. The requirement ensures that an assessment officer reviews the assessment before it is sent to the taxpayer, and the placing of the officer's signature establishes an effective date of the assessment that is relevant for certain timing requirements. Historically, the document reviewed and signed by the assessment officer has been Form 23C. Today Form 23C has been replaced by a computer-generated report known as Form RACS 006, and Form 23C is used (only) when the computer is unavailable. However, even though an assessment officer signs the RACS 006, the assessment officer does not have firsthand knowledge

as to whom the tax was assessed against. In 1996 the GAO (GAOIT-AIMD96-56) confirmed that the RACS 006 does not contain information from the master file of an alleged taxpayer. That testimony by the GAO states that the information contained in RACS 006 is based on Treasury Schedules, not individual taxpayer accounts.

To ensure the taxpayer's ability to challenge alleged errors in the assessment process, the regulations allow the taxpayer to request a copy of certain parts of the assessment record. However, the courts have generally held that the IRS need not provide a taxpayer with a copy of Form 23C. Instead, the courts have held that the IRS may submit Certificates of Assessments and Payments on Form 4340. Form 4340 details the assessments made and the relevant date that a Summary Record of Assessment (Form 23C) was executed. The courts have also held that these Certificates on Form 4340 "are presumptive proof of a valid assessment" if certified by a Certificate of Official Record on Form 2866.

The *Rosenquist* Grand Jury Indictment was filed with the U.S. District Court charging that taxable income was not properly reported and income taxes were not paid concerning the named Appellant. This means that the Grand Jury was informed of the deficiencies in income reporting and income taxes paid with no proper evidence or no proper factual or legal essential elements.

The Appellant did not receive the evidence documents at trial. Part of the evidence documents should have included certificates of assessments, payments and other specified matters – Form 4340 (Rev. 01-2002).

The only legitimate or relevant evidence that the IRS can properly utilize or present to the Grand Jury for an income tax assessment is a properly filled out and executed Form 4340 with a Certification Form 2866. Neither of the forms was available at the time the Grand Jury was in session concerning this case. To date, none of the Form 4340's are available concerning some of the counts and there were no Form 2866's available at any time.

Counts 1 thru 6 of the *Rosenquist* Indictment are defective because of the missing legal and fact elements, that being that no taxes are due and owing because the IRS has not legally or actually assessed an income tax on Form 4340 which is required under the statute with support of court decisions. The IRS has no evidence of even a civil liability. The IRS must furnish the Grand Jury the legal and proper Form 4340 assessments to have evidence of a tax liability due and owing according to the following Federal Appellate Court cases, to wit:

Gentry v. U.S., 962 F.2d 555 (6th Cir. 1992);
Johnson v. U.S., 990 F.2d 41 (2nd Cir. 1993);
Huff v. U.S., 10 F.3d 1440 (9th Cir. 1993);
Geiselman v. U.S., 961 F.2d 1 (1st Cir. 1992);
Johnson v. U.S., 123 F.3d 700 (2nd Cir. 1997);

Stallard v. U.S., 12 F.3d 489 (5th Cir. 1994); *Howell v. U.S.*, 164 F.3d 523 (10th Cir. 1998).

The government did not scrupulously observe rules or procedures which it has established; this case against the Appellant should be struck down and this case dismissed under the *Accardi* Doctrine.

The taxpayer in this instant case filed tax returns, which is not in dispute. There are court cases that upheld the right to have a valid tax assessment record before a person could be charged criminally where the *taxpayer had filed a tax return*. " . . . under no circumstances may the trial court usurp this right (valid tax assessment) by ruling as a matter of law on an essential element of the crime charged." *U.S. v. England*, 347 F.2d 425 (7th Cir. 1965) (Explanation added.)

"There is no doubt that a valid assessment, and proof thereof, was an essential element of the case against Appellants." *Banks v. U.S.*, 204 F.2d 666, reaffirmed, 223 F.2d 884 (8th Cir. 1955); *U.S. v. England*, supra.

Again, the IRS had never issued a certified individual or company tax assessment record on a form 4340 and including a Form 2866 – Certificate of Official Record concerning the Appellant at the time of the indictment. This omission of an essential legal and fact element results in no federal income tax liability. Therefore, there could never exist a criminal federal income tax liability giving jurisdiction to the U.S. District Court.

The denial of this Appellant's Motions to Dismiss under the *Accardi* Doctrine was beyond the Honorable District Judge's power and inconsistent with accepted principles and usages of law. The "*Accardi* Doctrine" was established by the U.S. Supreme Court in *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 269 (1954). Several courts have upheld the *Accardi* Doctrine since 1954 making it an accepted principle of law with extended usage in many applications.

An indictment must contain all of the elements of the offense. *Stirone v. U.S.*, 361 U.S. 212, 218 (1960). To be sufficient, an indictment must allege all material elements of the offense; if it does not, it fails to charge that offense. *U.S. v. Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999). To guarantee the right to be tried only after indictment, the Grand Jury must consider and find evidence supporting all of the crime's elements. *U.S. Cabrera-Teran*, supra.

The *Rosenquist* Indictment did not contain all of the elements of the offense; therefore, the Appellant could not be charged with an offense. In addition, the Grand Jury could not have considered and found evidence supporting each count because key evidence was withheld and the wrong legal standards were used by the Grand Jury.

In *Honea v. U.S.*, 344 F.2d 798, 803-04 (5th Cir. 1965): " . . . it is not enough that defendant should be prosecuted for violating a particular statute; rather, the indictment must also allege every element of the offense. Only in this way is any assurance furnished

that the Grand Jury found probable cause to believe the defendant in fact committed acts constituting the offense in question." "The failure of indictment to allege all elements of the offense *may not* be cured by evidence or instructions at trial, nor by . . . a bill of particulars, an indictment may not be actually or constructively amended, by adding material allegations to the offense charged or of another offense."

To be sufficient, an indictment must allege each element of the offense; if it does not, it fails to charge that offense. *U.S. v. Cabrera-Teran*, supra; *U.S. v. Guzman-Ocampo*, 236 F.3d 233, 236 (5th Cir. 2000).

Appellant in this instant case was charged with crimes that do not exist under the introduction and statutes cited in the indictment and therefore, all counts are fatally defective. *U.S. v. Miller*, 161 F.3d 977, 982 (6th Cir. 1998); *Government of Virgin Islands v. Greenidge*, 600 F.2d 437 at 439, n. 2 (3rd Cir. 1979).

It is never within the discretion of the prosecutor, Grand Jury or the court to make determinations premised on incorrect legal standards. *Koon v. U.S.*, 135 L.Ed.2d 392 (1996); *U.S. v. Castro*, 129 F.3d 226 (1st Cir. 1995). Therefore, Counts 1 thru 6 must be ruled to be null and void.

Counts 1 thru 6 have the missing legal and fact elements that before a tax liability can be due and owing on any income received, an official certified tax assessment certificate must be prepared by the IRS which is a form 4340. Neither the IRS nor the

government has form 4340's for the tax years involved in Counts 1 thru 6. Therefore, there is no evidence of any income or any tax liability due and owing by this taxpayer. Thus, the Grand Jury never was presented any Form 4340's and could not find probable cause to indict the Appellant in this case.

A tax due and owing or a tax deficiency is a "deficiency assessment" which is *not* a valid final determination or judgment of a "liability assessment." Several IRS procedures must be accomplished beyond a "deficiency assessment" before a tax "liability assessment" arises. When a tax return was filed as was done in this case, an official formal assessment must be made, i.e., Form 4340 and Form 2866. (*see* IRC 6203). A true tax due and owing comes *after* the tax "liability assessment." The Petit Jury instructions wrongly instruct the jury that a tax due and owing occurs *before* a tax "liability assessment" is made on a Form 4340. This principle is verified and established by the case of *U.S. v. England*, supra; where the Appellate Court stated that, " . . . an assessment is prima facie correct for all purposes, the *tax liability* is a valid obligation of a taxpayer due and owing to the Federal Government." [Emphasis added] This must be accomplished by a legal assessment establishing a tax liability on a certain date. *U.S. v. England*, supra. This is also an essential element of the crime. *U.S. v. England*, supra; *Banks v. U.S.*, supra, reaffirmed, 223 F.2d 884 (8th Cir. 1955); Tax evasion must be supported by IRS *formal* assessments and the *formal* assessments were prima facie evidence of tax deficiencies.

U.S. v. Silkman, 156 F.3d 833 (8th Cir. 1998). This negates the petit jury instruction that a tax deficiency is a true tax due and owing or a "tax liability." Only a formal assessment (Form 4340) is a tax "liability assessment" or a true tax due and owing.

This is one of the essential elements of a tax evasion charge; there must be a timely and proper tax "liability assessment" or formal tax assessment. Evidence may have been presented at trial that an official or formal tax "liability assessment" was *not* made to the Grand Jury. The indictment must have included this essential legal element by law, *Banks v. U.S.*, supra; reaffirmed, supra; *U.S. v. England*, supra. "The rule is settled that in a criminal case the judge may not direct a verdict of guilty no matter how conclusive the evidence. *United Brotherhood of Carpenters and Joiners of America v. U.S.*, 330 U.S. 395, 408, 67 S.Ct. 775, 91 L.Ed. 973 (1947). It is necessary that the Government prove to the jury beyond a reasonable doubt every essential element of the offense charged. *Christoffel v. U.S.*, 338 U.S. 84, 89, 69 S.Ct. 1447, 93 L.Ed. 1826 (1949); *Boatright v. U.S.*, 105 F.2d 737, 740 (8th Cir. 1939). The failure to charge an essential element of a crime is by no means a mere technicality. *See U.S. v. King*, 587 F.2d 956, 963 (9th Cir. 1978). *See U.S. v. Kurka*, 818 F.2d 1427, 1431 (9th Cir. 1987). Therefore, the Petit Jury instructions must follow the indictment which must legally include the legal essential element of having a tax "liability assessment" to constitute a criminal evasion charge. The Petit Jury instructions are

totally lacking this element and have substituted an incorrectly stated bogus and illegal statement of the tax law in criminal tax cases.

The prosecutor must prove each and every essential element of an offense per jury instructions. Since the issue of a tax "liability assessment" was not mentioned or proven, the prosecution failed to prove each and every essential element and the Appellant in this case is not guilty of the offense by any standard of review.

The Petit Jury had no chance to correctly decide a just verdict because the law presented to them was erroneous, incomplete and totally lacking along with having substituted incorrect, false and illegal law presented or offered in place of the correct and valid tax law in a criminal case.

Again, a tax deficiency is not a final judgment, decree or determination of a tax "liability assessment" that must ever be paid by the taxpayer or is binding on the taxpayer at anytime. The IRS cannot even legally lien or levy, etc. . . . against taxpayer's assets or property without a timely and proper official or formal "liability assessment." "Nevertheless, it is the assessment, and only the assessment, that sets in motion the collection powers of the IRS." *Laing v. U.S.*, 423 U.S. 161, 170 (1976). In fact, any tax assessment without a formal assessment procedure is forever void. *Philadelphia & Reading Corp. v. U.S.*, 944 F.2d 1063, 1073 (3rd Cir. 1991). The IRS is bound by the

procedures required for a tax "liability assessment." *U.S. ex rel. Accardi v. Shaughnessy*, supra. The alleged assessments in this case are forever void because *no* timely and proper tax "liability assessments" were made that were presented to the Grand Jury or petit jury which greatly prejudiced the defendant.

Because the Grand Jury and now the petit jury should have had the said essential element of an official or formal tax "liability assessment" included in the indictment and the petit jury instruction, which it did not; this constitutes fatal harmful error and injustice of Appellant's due process which requires dismissal of this case or a new trial.

Further, a tax due and owing or a tax deficiency payment to the IRS is not for a tax liability or "liability assessment" and which cannot be executed or enforceable even in a civil proceeding. The application of a tax due and owing or tax deficiency to a criminal proceeding is a direct violation of the right to due process of law under the Fifth Amendment of the U.S. Constitution.

To summarize, the following separate reversible fatal harmful errors are as follows:

1.) The Government illegally broadened the petit jury instructions and violated the Grand Jury indictment as to Counts 1 through 6.

2.) The Petit Jury instructions are totally incorrect as to making the tax due and owing

or a tax deficiency an element of a tax evasion charge.

3.) The Petit Jury instructions should have made the official or formal tax assessment (Form 4340) or a tax liability the essential element of a tax evasion charge since a tax return was filed. This essential element was totally missing and not included in the petit jury instructions.

4.) The Petit Jury instructions do not follow the indictment and include the essential legal element that a formal tax liability assessment (Form 4340) must be made by the IRS to constitute a tax evasion charge. Since the indictment must include this essential element, the Petit jury instructions must include the same.

3.) The Statute of Limitations has run on all offenses.

The fact that the government may have provided later the specific dates for the affirmative acts proves that the indictment was insufficient. If the specific dates were presented to the Grand Jury, the specific date must be in the Grand Jury indictment, not in the Grand Jury transcript to be legal. The Petitioner has no way to know or have access to Grand Jury transcripts.

Evidence presented to the Grand Jury does not satisfy indictment requirements to inform the Petitioner.

A criminal defendant will be tried *only* on charges presented in Grand Jury indictments. *U.S. v. Chandler*, 858 F.2d 254 (5th Cir. 1988). The Defendants are entitled to a legally sufficient indictment. *U.S. v. Napue*, 834 F.2d 1311 (7th Cir. 1987); *U.S. v. Hinkle*, 637 F.2d 1154, 1157 (7th Cir. 1981).

A criminal defendant can only be tried on an indictment as found by a Grand Jury, and especially upon all language found in the charging part of the instrument. *U.S. v. Smith*, 838 F.2d 436 (10th Cir. 1988); *U.S. v. Conlon*, 661 F.2d 235, 238 (D.C. Cir. 1981).

The indictment states, "Beginning in or about September 2003." The date of offense must be more specific. An indictment must include the facts and circumstances as will inform the accused of the specific offense with which he is charged. *U.S. v. Hess*, 124 U.S. 483, 487 (1888); *U.S. v. Rivera*, 837 F.2d 906, 918 (10th Cir. 1988). The specific factual date was not included in the *Rosenquist* Indictment. The specific date that is critical as to whether the alleged affirmative act occurred within or without the six (6) year statute of limitation is missing. The government in their opposition pleading attempts to illegally amend the indictment which proves that the *Rosenquist* Indictment was not sufficient and illegally attempted to *prove the dates at trial*. The facts must be set forth in the indictment, with reasonable particularity of *time*, place and circumstances. *U.S. v. Cruikshank*, 92 U.S. 542 (1875); *Russell v. U.S.*, 369 U.S. 749, 768 n. 15 (1962); *U.S. v. Rivera*, supra.

The failure of the indictment to allege a federal crime cannot be cured by any means. *U.S. v. Spinner*, 180 F.3d 514, 516 (3rd Cir. 1999); *U.S. v. Cabrera-Teran*, supra; *U.S. v. Tran*, 234 F.3d 798, 806 (2nd Cir. 2000).

The government had already illegally amended the *Rosenquist* Indictment even before trial.

THIS IS A CONSTRUCTIVE AMENDMENT!!!

If there is a constructive amendment, reversal is automatic or per se because the defendant may have been convicted on grounds not charged in the indictment. *U.S. v. Young*, 730 F.2d 221, 223 (5th Cir. 1984); *Stirone v. U.S.*, supra; *U.S. v. Nunez*, 180 F.3d 227, 230 (5th Cir. 1999).

The specific dates were never presented to the *Rosenquist* Grand Jury. An amendment by the court or jury instruction is per se fatal. *Russell*, supra; *Ex Parte Bain*, 121 U.S. 1 (1887); *U.S. v. Rivera*, supra, at 919. If the prosecutor plans to use offenses not charged in the indictment, he or she must present those particular facts (time and/or date of the Affirmative Act) to the Grand Jury. *U.S. v. Rivera*, supra, at 920.

Constructive amendments are typically found where the government offers proof of the offenses or transactions not even mentioned or changed in the indictment. *U.S. v. Berger*, 224 F.3d 107 (2nd Cir. 2000).

Overcharging of factual elements.

The Grand Jury Indictment against the Appellant is overreaching and overcharging for actions that may be crimes, but are not essential legal or fact elements of Title 26 U.S.C. § 7201, § 7203 or § 7206(1) of Counts 1 through 6.

Counts 1 through 6 have fatal defects of missing essential legal and fact elements and/or essential overcharging. These fatal defects demand dismissal of this instant case due to the harmful error and extreme prejudice to the Appellant.

The fatal defects of the indictment are the additional legal and factual elements as follows:

THE GRAND JURY CHARGES:

Introductory Allegations

1. Defendant RICHARD LOWELL ROSENQUIST is a resident of Dallas County, Iowa, within the Southern District of Iowa. Defendant previously was a resident of Madison Lake, Minnesota.

2. On or about April 15, 1996, and April 15, 1997, while a resident of Minnesota, the defendant timely filed joint individual income tax returns for the calendar years 1995 and 1996. The Internal Revenue Service conducted an audit of these returns and assessed additional tax and penalties on or about October 20, 1998.

3. During the calendar years 1997, 1998, and 1999, defendant had and received substantial gross income but failed to file an individual income tax return for any of these years at the time required by law. The Internal Revenue Service determined defendant's tax liabilities for each of these years based on available information and provided the defendant with a Notice of Deficiency, setting forth the tax, penalties, and assessments as determined by the Internal Revenue Service. The Notice of Deficiency was mailed to defendant, by certified mail, at defendant's residence in Linden, Iowa, on or about August 16, 2001.

4. Defendant sought review of the assessments for the calendar years 1995-1999 in the United States Tax Court. The proceedings in the United States Tax Court concluded on or about July 28, 1998, with respect to the calendar years 1995 and 1996; and on or about June 1, 2004, with respect to the calendar years 1997, 1998, and 1999.

5. Defendant failed to pay said assessments for the calendar years 1995-1999.

6. On or about September 24, 2003, the Internal Revenue Service filed a Notice of Federal Tax Lien against defendant and defendant's spouse, indicating an unpaid balance of assessment in the amount of $26,787.53 for the calendar year 1995;

and an unpaid balance of assessment in the amount of $15,744.85 for the calendar year 1996. The Internal Revenue Service also filed a separate Notice of Federal Tax Lien against the defendant for the calendar years 1997-1999, indicating unpaid balance of assessments in the amounts of $27,788.14 (1997), $20,977.50 (1998), and $18,982.96 (1999).

7. Beginning in or about September 2003, the Internal Revenue Service attempted to collect said assessments, including through levies and other lawful processes available to the Internal Revenue Service.

8. On or about April 13, 2007, the Internal Revenue Service received judicial authorization for the United States District Court for the Southern District of Iowa for the sale of defendant's residence located on Beaumont Avenue, in Linden, Iowa.

9. On or about May 1, 2007, the defendant mailed to the Internal Revenue Service documents purporting to be amended individual income tax returns for the calendar years 1995-1999.

10. On or about February 25, 2008, the defendant submitted an Offer in Compromise to the Internal Revenue Service, claiming that he had no funds available and offering to settle his tax liabilities

for the years 1995-2004 for the amount of $150.

11. Beginning with the calendar year 2000, the defendant did not file any individual income tax returns at the time required by law.

12. These introductory Allegations are incorporated into Counts 1-6 of this Indictment, alleged below, as if set forth fully therein.

THE GRAND JURY FURTHER CHARGES:

Count 1

(Evasion of Payment: 1995-1999)

Beginning in or about September 2003, and continuing until the date of this Indictment, in the Southern District of Iowa and elsewhere, the defendant, RICHARD LOWELL ROSENQUIST, a resident of Dallas County, Iowa, did willfully attempt to evade and defeat the payment of a large part of the income tax due and owing by him to the United States of America for the calendar years 1995-1999 by the following affirmative acts, among others:

(A) the concealment and attempted concealment from the Internal Revenue Service of the nature, extent, and location of defendant's assets;

(B) the placement of funds and property in the names of nominees and third parties, and otherwise attempting to cloud title of real property, including for

the purpose of attempting to place such funds and property beyond the reach of process;

(C) the attempted interference with the lawful collection efforts of the Internal Revenue Service, including through attempts to interfere with levies and garnishments and through attempts to interfere with the auction of defendant's residence in Linden, Iowa, on or about June 14, 2007;

(D) the filing of multiple petitions for bankruptcy in the United States Bankruptcy Court for the Southern District of Iowa, for the purpose of delaying collection activity by the Internal Revenue Service and the judicial proceedings seeking authorization to auction the residence on Beaumont Avenue; and

(E) the submission to the Internal Revenue Service of various documents, such as documents purporting to be income tax returns, for the purpose of causing further delay and hindrance to its lawful collection efforts.

Again, items 1 thru 12 of the Introductory Allegations and Count 1 (A) thru (E) are not essential legal and fact elements of Counts 1 through 6 involving the attempt to evade and defeat the income tax, filing a false tax return or failure to file a tax return. Yet, the wording found in the indictment directly charges the

Appellant with these overt supporting acts to the offenses.

These overt acts are missing all of the essential legal elements to charge a criminal offense along with a missing statutory citation. These are not the essential legal or fact elements of Title 26 U.S.C. § 7201, § 7203 or § 7206(1), but may be essential legal or fact essential elements for different federal criminal offenses not charged in this instant indictment.

Even if the correct statute was used, without more, the indictment does not charge a criminal offense. "*A statutory citation does not ensure that the Grand Jury has considered and found all essential elements of the offense charged. It therefore fails to satisfy the Fifth Amendment guarantee that no person be held to answer for an infamous crime under an indictment of a Grand Jury.*" (Emphasis added), *U.S. v. Pupo*, 841 F.2d 1235, 1239 (4th Cir.) (en banc), cert. denied, 488 U.S. 842 (1988); *U.S. v. Daniels*, 973 F.2d 272, 274 (4th Cir. 1992). "If an essential element of the charge has been omitted from the indictment, *the omission is not cured by the bare citation of the charging statute.*" (Emphasis added) *U.S. v. Camp*, 541 F.2d 737, 740-41 (8th Cir. 1976); *U.S. v. Zangger*, 848 F.2d 923, 925 (8th Cir. 1988). Note that these are 8th Circuit decisions.

Again, note that Counts 1 thru 6 did not even use a bare citation of the charging statute that even exists for the overcharging elements listed in Counts 1 thru 6 and there is no statute with the citation.

Counts 1 thru 6 do not cite the statute that the Government maintained that the Petitioner had violated in Counts 1 thru 6 for the overcharging elements. This element is necessary to establish the very illegality of the offense that is being enhanced which is present in the indictment. *U.S. v. Cina*, 699 F.2d 853, 859 (7th Cir. 1983), cert. denied, 464 U.S. 991; *U.S. v. Daniels*, supra.

Counts 1 thru 6 have missing essential legal and fact elements of the other alleged criminal offenses. Since the Grand Jury was misled on Counts 1 thru 6 as to the relationship to other allegations of criminal offenses, Counts 1 thru 6 could not have been fully understood by the Grand Jury with the taint of the illegal allegations.

Petitioner has challenged the Grand Jury indictment. A challenge to the indictment may be raised at any time under Rule 12(b)(2) [Revised Rule 12(b)(3)(B)]. *U.S. v. Baker*, 883 F.2d 13 (5th Cir. 1989); *U.S. v. Meacham*, 626 F.2d 503 (5th Cir. 1980); *U.S. v. Hart*, 640 F.2d 856 (6th Cir. 1981).

The indictment in this case is constitutionally defective and must be ruled as void. When an indictment fails to include an essential element of the offense charged, it thereby fails to charge any Federal offense, and a conviction under the indictment may not stand. *U.S. v. Hooker*, 841 F.2d 1225 (4th Cir. 1988); *U.S. v. Pupo*, supra. The indictment should lay out elements of the charge and factual circumstances underlying them. *U.S. v. Morris*, 623 F.2d 145, 149

(10th Cir. 1980); *U.S. v. Nunez*, supra; *U.S. v. White*, 258 F.3d 374 (5th Cir. 2001); *U.S. v. Rivera*, supra. Facts are to be stated, not conclusions of law alone. A crime is made of acts and intent, and these must be set forth in the indictment.

An indictment is only deemed constitutionally sufficient if it sufficiently apprises the accused of what he must be prepared to defend against. *Russell v. U.S.*, supra; *U.S. v. Schwab*, 61 F. Supp. 2d 1196 (D. Wyo. 1999). The concern is whether a defendant has "a clear understanding of each of the charges against him." *U.S. v. Edmonson*, 962 F.2d 1535, 1542 (10th Cir. 1992); *U.S. v. Schwab*, supra. It is never within the discretion of the prosecutor, Grand Jury or the court to make determinations premised on incorrect legal standards. *Koon v. U.S.* supra; *U.S. v. Castro*, supra. Therefore, Counts 1 thru 6 must be ruled to be null and void.

Nor can the Petitioner in this case determine what the government is accusing. The Petitioner does not have fair notice of what he must be prepared to defend against creating a constitutional fatal defect. *Russell v. U.S.*, supra; *U.S. v. Schwab*, supra.

In *Stirone v. U.S.*, supra, the indictment charged interference with *sand* imports, but the government only had evidence regarding an interference with *steel* imports. This was an essential missing element. An error of that constitutional magnitude cannot be deemed harmless. *Stirone*, supra, at 217. The Petitioner in this case has had his Fifth and Sixth

Amendment rights violated which greatly causes an extreme prejudice resulting in harmful error.

This overcharging is a serious fatal defect in the indictment because it has an equivalent effect on the Petitioner as being an essential missing legal or fact element of an indictment.

The Petitioner in this case was charged by a Grand Jury with offenses that are not included in the charging federal statute of Counts 1 thru 6. In other words, the Petitioner was charged with offenses that should not have been made against him. The Grand Jury never should have made the extra charges against the Petitioner. *Stirone v. U.S.*, supra, at 219. The Defendant could be convicted of an offense not charged in the statute. *Stirone v. U.S.*, supra. The conviction at trial would be reversed because the Count would have impermissibly added new elements to the offense. *U.S. v. Bizzard*, 615 F.2d 1080 (5th Cir. 1980).

The enlargement of an indictment breaches constitutional guarantees. *Stirone v. U.S.*, supra; *U.S. v. Harrill*, 877 F.2d 341 (5th Cir. 1989).

If the prosecutor plans to use offenses not separately charged in the same indictment, he or she must present those particular facts to the Grand Jury as a charge thus satisfying Fifth and Sixth amendment concerns along with due process notice requirements *U.S. v. Rivera*, supra.

The Petitioner is greatly prejudiced in this case because the Grand Jury could have found probable cause on an overcharge element when if only the actual element of the Count was presented, the Grand Jury may not have found probable cause.

The Government can't have it both ways nor can Petitioner be overcharged on any count that the prosecutor has in his mind.

The U.S. Supreme Court has provided a law or doctrine that gives the Appellant a legal remedy for the prosecutor's failure to comply; it is called the "*Accardi* Doctrine" which was established by the U.S. Supreme Court. "A government agency being the prosecutor must . . . scrupulously observe rules or procedures which it has established, and when it fails to do so, its action cannot stand and courts will strike it down." *U.S. ex rel. Accardi v. Shaughnessy*, supra; *U.S. v. Heffner*, 420 F.2d 809 (4th Cir. 1969).

Since the prosecutor has not followed the rules and procedures of this instant case a blatant travesty of justice has arisen and the courts should strike it down.

The affirmative acts in items 1 thru 12 and (A) thru (E) in Count 1 may have made it harder to collect the income tax, but that is not illegal unless properly charged. The Grand Jury was undoubtedly led to believe that each one of the affirmative acts in items 1 thru 12 and (A) thru (E) were illegal, thus they had no choice but to find probable cause.

The prosecutor apparently does not understand the difference between an offense charge and a "badge of the offense." A "badge of the offense" is an alleged act that may show that the offenses occurred, but is not part of the charge of the Grand Jury indictment count.

In this case, items 1 thru 12 and (A) thru (E) are merely "badges of the offenses," but the Grand Jury was not informed that these items were not part of the criminal offense charges. Thus, they found probable cause for acts that are not illegal with no proof to the contrary. This means that the indictment was overreaching and overcharged the Petitioner with non-existent crimes which are illegal.

Since the prosecutor has not followed the rules and procedures of this instant case a blatant travesty of justice has arisen and the courts should strike it down.

In addition, most of the alleged affirmative acts in Counts 1 thru 6 are not illegal under our common-law basic legal system in the U.S. Our common-law legal system basically can be stated as a system where a citizen is free to conduct their affairs any which way they please so long as they don't violate some specific law, *U.S. v. Caldwell*, supra. Making the government's job harder just isn't illegal, *U.S. v. Caldwell*, supra.

The affirmative acts may have made it harder to collect the income tax, but that is not illegal. The Grand Jury was undoubtedly led to believe that each

one of the affirmative acts were illegal, thus they had no choice but to find probable cause.

There is a huge difference between "*addressing*" and "***charging***" a criminal action.

> "charge" – a formal accusation of a crime as a preliminary step to prosecution.
>
> "address" – a label; to direct attention to

Grand Jury indictments are interpreted by what they actually say, not what the prosecutor intended them to say.

Count 1 charges the Petitioner with the federal criminal felony offense of being a resident of Dallas County. If the prosecutor showed the Grand Jury any evidence of the Defendant being a resident of Dallas County, then he would undoubtedly be charged with Count 1 regardless of any income tax liabilities owed, whatsoever.

This is because the prosecutor presented a written Grand Jury indictment to the Grand Jury that does not make item 1 of Introductory Allegations merely "addressing action and intent." Whatever the prosecutor said verbally to the Grand Jury is immaterial and irrelevant.

A defendant *cannot* be criminally charged with a felony offense on what was said or charged verbally in Grand Jury proceedings. A defendant is charged by the written Grand Jury indictment signed by the Grand Jury foreman and presented to the court in a transcribed public hearing.

Anything more is amending the indictment by persons other than the Grand Jury.

The Petitioner identifies the offenses he is charged with beyond the essential elements. The prosecutor and petit jury will be using the instant Grand Jury indictment to convict. This conviction will be illegally permitted because the Appellant will be tried on charges that were not made in the indictment against him.

The Petitioner was brought to trial in order that the charges were enlarged. The prosecutor used the presently existing indictment, then the charges are illegally enlarged according to *Stirone v. U.S.*, supra.

The Petitioner agrees that non criminal or criminal acts not charged *may serve as affirmative acts supporting* the conviction of any alleged offense.

The Key word is "*supporting*." The indictment does *not* say that these affirmative acts are supporting, the indictment is illegally "*charging*" the affirmative acts as violations. Yes, concealment of income may constitute relevant affirmative action's appropriate to the nature of the tax charges at issue. But, the *Rosenquist* Indictment charges directly the affirmative action as a direct element of the offense.

All of the affirmative acts in the *Rosenquist* Indictment are alleged as acts of violation of elements of the offenses.

The government may make an argument defending the way the indictment *should* read and is not recognizing the way that the indictment *actually* reads.

The indictment *did* give the Grand Jury liberty to indict under Counts 1 thru 6 because they were instructed to indict if they found probable cause that the Appellant did commit one (1) of the *supporting* alleged affirmative acts.

The Grand Jury could not have understood that "introductory allegations" would not be the same as elements of the offense charged in Counts 1 thru 6. The indictment does not explain a difference. Introductory paragraphs are considered part of numbered counts following them. *U.S. v. McGuire*, 381 F.2d 306, cert. denied, 389 U.S. 1053 (2nd Cir. 1967). Counts 1 thru 6 can only be read that each of the alleged affirmative acts of evasion constituted a violation. There is nothing in the indictment to the contrary.

Such affirmative acts by virtue of Counts 1 thru 6 are alleged to include the acts described in the indictment. That is the problem with the indictment – this is overcharging which is as illegal as missing essential elements.

This Honorable Supreme Court must order the District and Appellate Court to follow its Circuit Court decisions based on the legal principle of "stare decisis." If "stare decisis" is not followed, then our legal system is in a state of chaos and uncertainty.

The District Court Order ignores this established principle of law.

Stare decisis –

"The bedrock of stare decisis is that lower courts are bound by the precedential authority of cases rendered by higher courts. *U.S. ex rel. Shore v. O'Leary*, 833 F.2d 663, 667 (7th Cir. 1987). This limitation on judicial power is one of the cornerstones of the legal structure in that it serves broader societal interests such as the orderly and predictable application of legal rules." *Miller v. U.S.*, 868 F.2d 236 (7th Cir. 1989).

"One foundation block of our judicial system is the principle of stare decisis, which demands adherence to precedents. Decisions are made in accord with previous authoritative decisions in similar cases emanating from one's own circuit and from the Supreme Court. A lower court owes deference to those above it; ordinarily it has no authority to reject a doctrine developed by a higher court. *See, e.g., Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed.2d 260 (1983) (per curiam); *Perri v. Director, Dept. of Corrections of Ill.*, 817 F.2d 448, 451 n. 4 (7th Cir. 1987)." *U.S. ex rel. Shore v. O'Leary*, supra.

"Needless to say, *only this Court may overrule one of its precedents*. Until that happens [our decision] is the law. . . ." (Emphasis added.) *Thurston Motor Lines, Inc. v. Jordan Rand, Ltd.*, supra.

CONCLUSION

WHEREFORE, IT IS Prayed that this Honorable Supreme Court enter an Order to compel the Honorable Appellate Court to perform their mandatory duties correctly, follow Stare Decisis, dismiss this case and allow this Petitioner's Due Process to be upheld.

The Petitioner also requests that Findings of Fact and Conclusions of Law be included with any and all rulings on the above rulings or request.

Respectfully submitted,

RICHARD LOWELL ROSENQUIST –
Pro se
25045 Beaumont Avenue
Linden, Iowa 50146
(641) 757-9295

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 10-1307

United States of America, Appellee, v. Richard Lowell Rosenquist, Appellant.	* * * * * * * *	Appeal from the United States District Court for the Southern District of Iowa. [UNPUBLISHED]

Submitted: November 4, 2010
Filed: November 4, 2010

Before WOLLMAN, MELLOY, and GRUENDER, Circuit Judges.

PER CURIAM.

A jury convicted Richard Rosenquist of tax evasion, failure to file a tax return, and filing false tax returns, and the district court[1] sentenced him to 51 months in prison and 3 years of supervised release. Rosenquist filed this appeal in which his counsel has

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[1] The Honorable Robert W. Pratt, Chief Judge, United States District Judge for the Southern District of Iowa.

moved to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). In the *Anders* brief, counsel argues that the district court erred in imposing an enhancement for Rosenquist's role in managing and supervising a criminal activity. In a pro se supplemental brief, Rosenquist argues that his indictment was defective because the government failed to present the grand jury with tax assessment records. We reject these arguments.

First, the district court did not err in imposing a role enhancement under U.S.S.G. § 3B1.1(c) for leading, organizing, managing, or supervising a criminal activity. *See United States v. Zimmer*, 299 F.3d 710, 724 (8th Cir. 2002) (standard of review). Rosenquist's son and daughter testified at trial that Rosenquist directed them to file fraudulent liens against his residence, which the Internal Revenue Service had received permission to auction to satisfy his tax liabilities. *See United States v. Bewig*, 354 F.3d 731, 738 (8th Cir. 2003) (to justify leadership enhancement, defendant need only have supervised one other participant in criminal activity); *United States v. Garrison*, 168 F.3d 1089, 1096 (8th Cir. 1999) (enhancement may apply even if management activity was limited to single transaction).

Second, we reject Rosenquist's pro se challenge to his indictment. *See Costello v. United States*, 350 U.S. 359, 363-64 (1956) (defendant may not challenge indictment on grounds that there was inadequate or incompetent evidence before grand jury); *United States v. Wilkinson*, 124 F.3d 971, 977 (8th Cir. 1997)

(grand jury may indict on whatever evidence is laid before it); *see also United States v. Sanders*, 341 F.3d 809, 818-19 (8th Cir. 2003) (except in cases involving racial discrimination in composition of grand jury, guilty verdict by petit jury excuses errors at grand jury level that are connected with charging decision).

Finally, after reviewing the record independently under *Penson v. Ohio*, 488 U.S. 75 (1988), we have found no nonfrivolous issues for appeal. Accordingly, we grant counsel's motion to withdraw, and we affirm the district court's judgment.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-1307

United States of America,

Plaintiff-Appellee

v.

Richard Lowell Rosenquist,

Defendant-Appellant

Appeal from U.S. District Court for the
Southern District of Iowa – Des Moines
(4:09-cr-00076-RP-1)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

November 04, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-1307/1541

United States of America

Appellee/Cross-Appellant

v.

Richard Lowell Rosenquist

Appellant/Cross-Appellee

Appeal from U.S. District Court for the
Southern District of Iowa – Des Moines
(4:09-cr-00076-RP-1)

ORDER

Appellant's appointed attorney has submitted an *Anders* brief, and the Clerk is directed to file the brief. Appellant is granted permission to file a pro se supplemental brief raising any additional issues he wishes the court to consider. Pursuant to the Bureau of Prisons appellant is currently in transit. A deadline for the supplemental brief will be set once the appellant has been relocated.

The government has filed a cross-appeal in the matter, and the government is directed to file its cross-appellant's brief by May 14, 2010. The brief should not address any issues contained in appellant's *Anders* brief. Appellant's counsel should file a

response to the government's cross-appeal by June 4, 2010. No further briefing is required at this time.

Appointed counsel's motion to withdraw is held in abeyance pending the completion of the *Penson* review.

April 26, 2010

Order Entered Under Rule 27B(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,	*	
Plaintiff,	*	4:09-cr-00076
v.	*	ORDER
RICHARD LOWELL ROSENQUIST,	*	(Filed May 18, 2010)
Defendant.	*	

Before the Court is a Motion to Dismiss under Independent Action, filed by Richard Rosenquist ("Defendant") on May 10, 2010, in which Defendant requests that the Court set aside his numerous tax convictions because the Government failed to even allege, let alone prove, the *mens rea* element of the offenses. Clerk's No. 149. The Government filed a Resistance, stating that the Court lacks jurisdiction because Defendant "is not petitioning the Court under § 2255" and because "the pendency of [Defendant's direct] appeal has divested [the] Court of jurisdiction." Clerk's No. 76 (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). The Court agrees with the Government for the reasons enumerated in the Resistance and further finds that Defendant failed to cite any legal authority upon which the Court could grant relief. Moreover, even if the Court possessed jurisdiction over Defendant's Motion, the Court would not grant any relief because

the Court has previously reviewed and upheld the sufficiency of the Indictment and the evidence against Defendant. *See* Clerk's Nos. 30, 40, 60, 99, 111, & 126. Indeed, the Court is firmly convinced that the Government adequately charged Defendant and that Defendant is guilty of every offense of conviction. Accordingly, Defendant's Motion is DENIED. If the Court erred, Defendant should raise the issue before the Circuit.

IT IS SO ORDERED.

Dated this 18th day of May, 2010.

/s/ Robert W. Pratt
ROBERT W. PRATT, Chief Judge
U.S. DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-1307

United States of America

Appellee

v.

Richard Lowell Rosenquist

Appellant

Appeal from U.S. District Court for the
Southern District of Iowa – Des Moines
(4:09-cr-00076-RP-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 13, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans